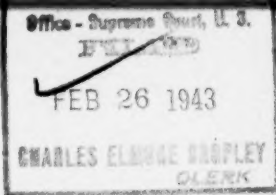


26



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 769

THE SIOUX TRIBE OF INDIANS,  
*Petitioner,*

*vs.*

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS AND BRIEF IN SUPPORT  
THEREOF.

RALPH H. CASE,  
*Counsel for Petitioner.*

JAMES S. Y. IVINS,  
RICHARD B. BARKER,  
RICHARD W. CASE,  
*Of Counsel.*



# INDEX.

## SUBJECT INDEX.

	Page
Petition for writ of certiorari.....	1
Opinion below.....	1
Jurisdiction.....	1
Statement.....	2
Statutes involved.....	7
Questions presented.....	15
Specifications of error to be urged.....	16
Reasons for granting the writ.....	18
Brief in support of petition.....	20
On the law.....	20
On the facts.....	23
Conclusion.....	25

## TABLE OF CASES CITED.

<i>Cherokee Nation v. Hitchcock</i> , 197 U. S. 294.....	20
<i>Chippewa Indians v. United States</i> , 301 U. S. 358.....	20
<i>Harrison v. Northern Trust Co.</i> , — U. S. —, decided Jan. 11, 1943.....	24
<i>Heff, Re</i> , 197 U. S. 488.....	22
<i>Lane v. Santa Rosa</i> , 249 U. S. 110.....	20
<i>Lone Wolf v. Hitchcock</i> , 187 U. S. 553.....	19, 20
<i>Monongahela v. United States</i> , 148 U. S. 312.....	22
<i>Shoshone Tribe of Indians v. United States</i> , 299 U. S. 476, 304 U. S. 111.....	21, 22
<i>United States v. Creek Nation</i> , 295 U. S. 103.....	20, 22
<i>United States v. Great Falls Mfg. Co.</i> , 112 U. S. 645.....	22
<i>United States v. Jones</i> , 109 U. S. 513.....	23
<i>United States v. Kagama</i> , 118 U. S. 375.....	20
<i>United States v. Klamath and Moadoc Tribes</i> , 304 U. S. 119.....	21, 22
<i>United States v. Lynah</i> , 188 U. S. 445.....	22
<i>United States v. New River Collieries Co.</i> , 262 U. S. 341.....	22
<i>United States v. Russell</i> , 13 Wall. 623.....	22
<i>Winnebago Tribe of Indians v. The United States</i> , Court of Claims, No. M-421, decided October 25, 1942.....	18
<i>Yankton Sioux Tribe v. United States</i> , 272 U. S. 351....	20

## STATUTES CITED.

	Page
Act of August 15, 1876 (19 Stat. 176, 192).....	11
Act of February 28, 1877 (19 Stat. 254).....	12, 16
Act of February 13, 1925, Section 3(b).....	2
Act of June 3, 1920 (41 Stat. 738).....	7, 16
Constitution of the United States, Fifth Amendment..	21
Treaty of April 29, 1868 (15 Stat. 635).....	2, 3, 8

## CONGRESSIONAL RECORD.

Congressional Record, House of Representatives, May 28th, 1920, p. 7846.....	24
Congressional Record, House of Representatives, May 28th, 1920, p. 7848.....	24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

**No. 769**

---

THE SIOUX TRIBE OF INDIANS,

*vs.*

*Petitioner,*

THE UNITED STATES.

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.**

---

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case June 1, 1942, Court of Claims Docket Number C-531-(7), motion for new trial overruled October 5, 1942 (R. 97).

**Opinion Below.**

The opinion of the Court of Claims is not yet reported; but is set out in full in the transcript submitted with this petition (R. 23-95).

**Jurisdiction.**

An order extending the time within which to file a petition for a writ of certiorari to March 4, 1943, was signed by the Chief Justice on December 29, 1942 (R. 97).

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

### Statement.

The petitioner comprises those Indians or their descendants of the Sioux Tribe who were parties to the Treaty of April 29, 1868 (15 Stat. 635). That Treaty established a permanent reservation for the Sioux Tribe in Dakota Territory, bounded as follows:

“ \* \* \* commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; \* \* \* ”

(Art. 2, Treaty of April 29, 1868; 15 Stat. 635; R. 28-29.)

The same treaty also provided as follows:

“In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the

right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase."

(Art. 11, Treaty of April 29, 1868; 15 Stat. 635; R. 32.)

The treaty further provided:

"The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained to pass through the same; \* \* \* "

(Art. 16, Treaty of April 29, 1868; 15 Stat. 635; R. 34.)

The treaty also provided:

"No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty."

(Art. 12, Treaty of April 29, 1868; 15 Stat. 635; R. 33.)

By virtue of the foregoing provisions of the Treaty of 1868 the petitioner held title to the permanent reservation described in Article 2. It also held a large area of land to the south, west, and north of the permanent reservation under conditions expressed in the treaty.

In the year 1874 a military expedition in command of Lieutenant Colonel George A. Custer proceeded into the

area described in the foregoing quotations from the treaty for the purpose of exploration. As a result of the exploration made by the expedition under the command of Custer, gold was discovered in the Black Hills, which lie within the area reserved to petitioner. This discovery of gold was made public August 27, 1874, and thereupon the white citizens of the United States invaded the territory reserved to petitioner and took possession of the gold bearing area, or that which was supposed to be gold bearing, in violation of the treaty and in violation of the rights of petitioner (R. 35-36).

In the year 1875 a Commission headed by Hon. William B. Allison was appointed by the Secretary of the Interior, with instructions to negotiate with the Sioux Tribe of Indians, petitioner, for the acquisition by the Government of the Black Hills section of their reservation (R. 42). The instructions given the Commission appear, in part, in the findings of the court below (R. 42-43-44-45).

The Allison Commission held a council with the leaders and members of the Sioux Tribe in the month of June, 1875, which council resulted in a refusal by the Sioux Tribe, petitioner, to cede to the Government for the consideration offered by the Commission, the land within the Black Hills area (R. 45-46).

Concurrently with the foregoing council of 1875 a detailed geological examination of the Black Hills area was made under the direction of Walter P. Jenney, who submitted a report dated November 8, 1875, a portion of which report is set out in the findings of the court below (R. 46-49).

The Commissioner of Indian Affairs in his annual report for the fiscal year 1875 stated the conditions which prevailed in respect to the Black Hills area,—the gold rush, the invasion by the white citizens, the rights of the petitioner herein, and, in his opinion, the measure of compensation



which should be made to the Indians for the taking of their lands, which obviously seemed to have occurred or was about to occur (R. 49-52).

At the close of the year 1875 the white citizens of the United States were in possession of the Black Hills area; the Government had failed to close a treaty or agreement for the cession of the area. The President of the United States referring to the annual report of the Secretary of the Interior recommended to the Congress that appropriations for substance of the Sioux Indians "may be issued or withheld". The Secretary of the Interior in the report referred to by the President suggested as follows:

"It is submitted, therefore, under these circumstances, for the consideration of Congress, whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment of the gold fields in the Black Hills and the right-of-way thereof" (R. 52-54).

By the Act of August 15, 1876, the Congress provided that no further appropriations should be made for the subsistence of the Sioux Tribe, petitioner, until and unless the tribe relinquished all of that portion of their permanent reservation lying west of the 103rd meridian (R. 55-56).

The President appointed a Commission to negotiate further with the Sioux Tribe, petitioner, for the desired cessions and stipulations as provided by the Act of August 15, 1876. The Commission was unable to obtain the assent of three-fourths of the male adult Indians of the Sioux Tribe, petitioner, to the agreement proposed by the Commission. More than 90% of the Indians refused to assent (R. 56).

The Commission presented to the President, who in turn presented to the Congress, the document which had been entrusted to the Commission but which had not been as-

sented to by the Sioux Tribe, petitioner. The President in presenting the document to the Congress submitted the following statement:

“I ask your especial consideration of these Articles of Agreement as among other advantages to be gained by them is the clear right of citizens to go into a country of which they have taken possession and from which they cannot be excluded” (R. 57).

Thereafter the Congress passed and the President signed the Act of February 28, 1877 (19 Stat. 254), which act of Congress established the western boundary of the permanent reservation of the Sioux Tribe, petitioner, as:

“\* \* \* the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.”

The effect of the foregoing Act of February 28, 1877, was to take from Petitioner 7,345,157 acres, which theretofore was a part of the permanent Reservation of Petitioner under the Treaty of 1868 (*supra*) (R. 16). Further the effect of the said Act was to take from the Petitioner their rights in lands outside the permanent reservation in 1868

to which lands Petitioner held the exclusive right to use and occupy, to roam over and hunt on.

The said Act of February 28, 1877, made provision for subsistence of the Sioux Tribe, petitioner. Under this Act the United States appropriated and expended a substantial sum of money in the years succeeding the passage of the Act.

The Petitioner asserts that it is entitled to just compensation for its lands and rights in lands taken from it by the Act of February 28, 1877. The action which is now before this Court was filed under an Act of Congress authorizing such action to be brought (Act of June 3, 1920, 41 Stats. 738).

### **Statutes Involved.**

The material provisions of the Jurisdictional Act under which this cause of action is brought are as follows (Act of June 3, 1920, 41 Stat. 738):

“That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys, employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians" (R. 2-4).

The material provisions of the Treaty of April 29, 1868, (15 Stat. 635) are as follows:

"Article 2. The United States agrees that the following district of country, to wit; viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same,

thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning, and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

“Article 10. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on or before the first day of August of each year, for thirty years, the following articles, to wit:

“For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of homemade socks.

“For each femade over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

“For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

“And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians on which the estimate from year to year can be based.

“And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named.”

“Article 11. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase.

"Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

"Article 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained to pass through the same;"

The material provisions of the Act of August 15, 1876 (19 Stat. 176, 192), are as follows:

"For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided*, That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and

accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision; And provided, also, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting" (R. 55-56).

The material provisions of the Act of February 28, 1877 (19 Stat. 254), are as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bullis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: Provided, That nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted, except article four, except also the following portion of article six; 'And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and com-*



fortable dwelling house' said article not having been agreed to by the Sioux Nation; said agreement is in words and figures following, namely: 'Articles of Agreement made pursuant to the provisions of an Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bullis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, and also the Northern Arapahoes and Cheyennes, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

"Article 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29th, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including

all privileges of hunting; and article 16 of said treaty is hereby abrogated.

“Article 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

“Article 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

“Article 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one half-pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided

by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor (the aged, sick, and infirm excepted); and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

“Article 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.”

### **Questions Presented.**

Whether the Sioux Tribe, petitioner, by virtue of the Treaty of April 29, 1868 (*supra*) obtained title to and a vested interest in the lands described as the permanent reservation by said Treaty such that said title and interest could not be taken from the Sioux Tribe without the payment of just compensation under the Constitution of the United States.

Whether the Sioux Tribe, petitioner, by virtue of the Treaty of April 29, 1868 (*supra*), had an interest in the lands reserved for the use of the tribe and for hunting purposes outside the permanent reservation such that said interest could not be taken from the Sioux Tribe under the Constitution of the United States, without just compensation.

Whether the Act of February 28, 1877 (19 Stat. 254) was, by its terms, such a taking by the United States of the property of the Sioux Tribe, petitioner, as to require the payment of just compensation under the Constitution of the United States.

Whether the Jurisdictional Act of June 3, 1920 (41 Stats. 738) conferred jurisdiction on the Court of Claims and the Supreme Court of the United States to hear, consider and determine the action of the Sioux Tribe against the United States now before this Court.

Whether the Congress in passing the Act of June 3, 1920 (*supra*), intended by that Act that the Court of Claims and the Supreme Court of the United States shall have and exercise the jurisdiction and enter the determination stated in the foregoing question and further should be bound and obligated to exercise the jurisdiction and make the determination as provided by the Act of June 3, 1920.

Whether the determination of the amount of just compensation is a political question to be decided by the Legislative Branch of the Government or a judicial question to be decided by the courts.

### **Specifications of Error to Be Urged.**

(1) The court below erred in the decision complained of in Finding 18 (R. 57) as appears in the following:

“The record, as a whole, does not justify a finding that the chiefs, headmen, or the Indians of the Sioux

Tribe who assented to and signed the agreement, which became the Act of February 28, 1877, hereinafter mentioned, did so under duress, or that the commission used undue influence or imposed upon the Indians who did sign the agreement."

Petition relies upon the Act of August 15, 1876 (R. 55-56), to establish the fact that the Sioux Tribe was, by that Act, under duress.

(2) The court below erred in the following conclusions of law.

"A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a 'taking' or 'for the misappropriation of any lands of said tribe.' " (R. 72).

"In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the Price and Osage cases, and other cases cited, *supra*, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith" (R. 76).

"The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented."

"In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the Acts of Congress and inquire into any moral obligations

of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. *Lone Wolf v. Hitchcock*" (R. 91).

"The plaintiff tribe is not entitled, as a matter of law, to recover from the United States, and the petition must therefore be dismissed. It is so ordered" (R. 95).

(3) The court below erred in failing to give effect to the intent of Congress expressed in the Act of June 3, 1920 (*supra*).

(4) The court below erred in failing to follow the decisions of this Court that the question of "just compensation" is a judicial and not a political question.

### **Reasons for Granting the Writ.**

(1) Petitioner asserted above and now asserts that lands belonging to the petitioner were taken from it without the payment of just compensation, thereby raising a constitutional question under the Fifth Amendment to the Constitution,—“nor shall private property be taken for public use without just compensation.”

(2) The amount in controversy is substantial. The Sioux Tribe, petitioner, includes not less than twenty-nine thousand individuals, all of whom are citizens of the United States; The area involved is not less than fifty million acres of land; The controversy is one of long standing, not less than sixty-five years.

(3) The court below in at least one other Indian case, to-wit: *Winnebago Tribe of Indians v. The United States*, Court of Claims, No. M-421, decided October 25, 1942, relies upon the decision in the case at bar as determining the *Winnebago* case.  
Winnebago case.

In that case the court held—

“We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of *Sioux Tribe of Indians v. The United States*, No. C-531-(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is determinative of the case at bar.”

(4) The court below, in relying upon *Lone Wolf v. Hitchcock*, 187 U. S. 553, has failed to follow the law as established by the decisions of this Court.

(5) The court below failed in its interpretation of the Jurisdictional Act of June 3, 1920 (*supra*) and further the court failed to give effect to the intent of the Congress expressed in the Act of June 3, 1920, and in the proceedings of the Congress when the bill which became the Act of June 3, 1920, was before the Congress for passage.

(6) The court below failed to follow the principle established by the decisions of this Court that the question of “just compensation” is a judicial and not a political question.

## BRIEF.

## On the Law.

Petitioner submits that the following principles of law are established by the decisions of this Court.

The power of the United States to control and manage the property of Indian tribes is incident to the sovereignty of the United States. That power has long been exercised. It is clearly stated in *United States v. Kagama*, 118 U. S. 375 at 385.

The power to administer Indian property is vested in the Congress and when exercised within constitutional limitations constitutes a political question not subject to the review by the courts; *Cherokee Nation v. Hitchcock*, 197 U. S. 294; *Lone Wolf v. Hitchcock*, 187 U. S. 553.

In the last two cited cases neither the *Cherokee Nation* nor *Lone Wolf* asserted a taking of Indian property by the Acts of Congress complained of. In each case an injunction was sought to restrain the Secretary of Interior from carrying out Acts of Congress administering Indian property. In neither case did the complaining parties proceed under a special jurisdictional act authorizing a judicial inquiry into the effect of the Acts of Congress complained of.

In neither the *Cherokee Nation* case, nor in the *Lone Wolf* case, did the complaining parties seek to recover damages for property taken.

The power of the Congress to administer Indian property must be exercised within constitutional limits. When in the exercise of that power the Congress transgresses constitutional limitations, the Indians affected by such transgressions are guaranteed judicial relief by the Constitution. *Lane v. Santa Rosa*, 249 U. S. 110; *Yankton Sioux Tribe v. U. S.*, 272 U. S. 351; *United States v. Creek Nation*, 295 U. S. 103; *Chippewa Indians v. United States*, 301 U. S. 358;



*United States v. Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, 304 U. S. 111.

In the cases cited, with the exception of the first, the Indian Tribes proceeded under special jurisdictional acts seeking to recover damages for property taken by the United States. In each case it was established that the property had been taken and that such taking transgressed the constitutional limitation imposed upon the United States by the Constitution and it was held that the Indian Tribes were entitled to recover just compensation for their land.

In the case at bar the taking by the United States is fully established by the findings of fact entered by the Court of Claims. The Sioux Tribe, petitioner, proceeded in the Court of Claims under a clear and specific Jurisdictional Act authorizing the judicial inquiry and a determination of the claims of that Tribe.

In the case of the Shoshone Tribe v. United States, *supra*, the language of the Jurisdictional Act under which that Tribe proceeded follows closely the language of the Jurisdictional Act under which the Sioux Tribe, petitioner, is now proceeding.

In the case at bar petitioner's lands were taken from it by an Act of Congress (Act of February 28, 1877, *supra*). The taking was against the expressed will of the Tribe. The property when so taken was turned over to white citizens of the United States or held by the United States. The petitioner, at no time, has had any interest in the proceeds from the sale of the lands or the use of the lands so taken. The cases last cited are squarely in line with the case at bar and those cases support the contention of petitioner that in passing the Act of February 28th, 1877, *supra*, the Congress has transgressed the constitutional limitations imposed by it to the 5th Amendment to the Constitution.

The petitioner, under the Treaty of April 29, 1868, *supra*, held an Indian title to the lands described in that treaty. That title was as sacred as a title in fee held by any citizen of the United States. *Shoshone Tribe of Indians v. United States*, 299 U. S. 476; *United States v. Klamath and Moadoc Tribes*, 304 U. S. 119; *United States v. Creek Nation*, 295 U. S. 103.

The question of "just compensation" is a judicial question and the courts cannot be foreclosed by a Congressional enactment that attempts to fix compensation for property taken by or under an Act of Congress. *Monongahela v. United States*, 148 U. S. 312; *United States v. Lynah*, 188 U. S. 445; *United States v. Great Falls Manufacturing Company*, 112 U. S. 645; *United States v. Russell*, 13 Wall. 623.

In the *Monongahela* case the Congress attempted to eliminate the value of the Company's franchise from consideration by the courts. Thus the Congress attempted to fix just compensation for the property taken from the *Monongahela Company*.

Correspondingly in the case at bar, the Act of Congress which took the Sioux lands, provided for subsistence of the Sioux Tribe, but limited the appropriations therefor to such time as the Sioux Indians might be able to support themselves. The compensation thus provided for the Sioux Tribe by the Act of February 28, 1877, is indefinite and uncertain, subject to the will of the Congress, subject to a change of opinion by the Congress, subject to the uncertain factor of self-support. Cf. *Re Heff*, 197 U. S. 488.

The rule which fixes just compensation is "what the property was worth at the time it was taken, together with such added amount for the use of the property from the time it was taken to the time of judgment as will be just compensation to the owner. *United States v. New River Collieries Co.*, 262 U. S. 341.

It is only necessary to read the Act of February 28th, 1877, to see that the Act by its terms does not provide just compensation within the rule last above stated.

The Court of Claims erred in deciding that the power to take the lands of an Indian tribe for public purposes and the resulting power to fix just compensation is a single unit of power and wholly of a political nature. In the case of *United States v. Jones*, 109 U. S. 513, this Court clearly drew the dividing line between the power to take lands for public use and the resultant power to fix just compensation for said lands.

In the case referred to, the Government's theory was that both the power to take and the power to fix just compensation were included in a single political question. In discussing the theory of the Government's position, the Court said:

518-519 "There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty and, as said in *Boom Co. v. Patterson*, requires no constitutional recognition. 98 U. S. 406 (XXV., 208). The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power. *It is no part of the power itself, but a condition upon which the power may be exercised.*" (Italics ours.)

### **On the Facts.**

The question of what the Congress intended when it had before it the bill H. R. 400, which became the Act of February 20, 1877, of major importance in the case at bar.

The Court below, R. 92-93-94, quoted from the Report of the Committee on Indian Affairs of the House of Repre-

sentatives (66th Congress, 1st Session). The Court failed to take into consideration the fact that the claim which is now being presented to this Court was the only claim which was called to the attention of the Congress at the time the bill, H. R. 400, was under consideration. That bill was introduced by Harry L. Gandy, Member of Congress, Third District of South Dakota. The bill was reported by Mr. Gandy to the House. Mr. Gandy was a Member of the Conference Committee on the part of the House and when the conference report was before the House for final action, speaking for the conferees on the part of the House, Mr. Gandy said in part:

“By far the largest claim of the Sioux is that with relation to the alleged enforced cession of the Black Hills in 1876, and for that reason this bill has been very commonly referred to among the Sioux as the Black Hills Claim bill.” (Congressional Record, House of Representatives, May 28th, 1920, page 7846).

Mr. Gandy also stated on the same occasion:

“Now, after all these years there will be a determining of this question, and if it shall be found that the lands of the Sioux Indians were wrongfully appropriated an accounting shall be had and just payment shall be made therefor. This should be done from the standpoint of right and justice.” (Congressional Record, House of Representatives, May 28, 1920, p. 7848).

The authority for the last quotation from the Congressional Record is found in a recent decision of this Court in *Carter M. Harrison, etc. v. The Northern Trust Co. et al.*, — U. S. —, Jan. 11, 1943, where the Court said:

“But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on superficial examination.’ ”

The Court below held that the Sioux Indians were not under duress in 1876 when the Articles of Agreement were presented to the Tribe (R. 55, 56).

At that time the members of the Sioux Tribe were told by the Commission of the Act of August 15, 1876 (19 Stats. 176) (R. 55-56). The legal effect of the Act of August 15th, 1876, was to place the Sioux Tribe under duress. The Act of August 15, 1876, threatened the suspension of all appropriations for subsistence of the Sioux Tribe unless they agreed to the cession of the Black Hills area. The Sioux Tribe, at that time, enjoyed the guarantees contained in Article 10 of the Treaty of April 10, 1868, *supra*, which provisions were to run for thirty years. The provision in Article 10 for the annual appropriation of \$10 per capita for Sioux Indians who were roaming and hunting was in itself sufficient, if properly expended, to have provided the Sioux Tribe with as much subsistence as they were then receiving. Therefore, the threat to stop the appropriations for subsistence of the Sioux Tribe put the Sioux Tribe in imminent peril, and this does constitute duress.

### **Conclusion.**

In view of the foregoing, it appears clear that the Court below has failed to distinguish between the power to administer Indian property on the one hand and the results of the exercise of that power on the other hand.

In the case at bar the results of the exercise of the power to control Indian property plainly transgress constitutional limitations.

The property of the Sioux Tribe was taken from it by the Act of February 28th, 1877, *supra*. By the terms of that Act the Congress attempted to fix the compensation which would be paid to the Sioux Tribe for its lands. The lands in question were not administered for the benefit of the

Sioux Tribe, but were thrown open to white settlement. The Sioux Tribe had no further interest in the lands, nor in the proceeds derived from those lands.

The case is clearly one for a judicial determination of just compensation. Petitioner respectfully submits that the writ should issue.

RALPH H. CASE,  
*Attorney for petitioner.*

Of Counsel:

JAMES S. Y. IRVINS,  
RICHARD B. BARKER,  
RICHARD W. CASE.

(5045)

